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Criminal Prohibition on Salary Supplement for Reserve or Guard Personnel

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9.0—Miscellaneous

Q: I am a captain in the Army Reserve. I was involuntarily called to active duty for a year, and then I voluntarily extended for a second year. My active duty O-3 pay is substantially less than my regular civilian pay, but my employer graciously offered to make up the difference during my involuntary activation. When I notified the employer that my involuntary activation had ended and that I was voluntarily extending for a second year, my employer agreed to continue making up the difference in pay until I return to work. I contacted the National Committee for Employer Support of the Guard and Reserve (ESGR) and nominated my employer for the Patriot Award. My employer informed me recently that he had received that award and had displayed it prominently in his office.

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Everything was going along fine until last month, when an Army judge advocate told me that it is a crime for my employer to supplement my Army salary while I am on active duty, and that it is a crime for me to accept that salary supplement. What gives?

A: The Army judge advocate is referring to Title 18, United States Code, section 209(a), which provides as follows: "Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection shall be subject to the penalties set forth in section 216 of this title." [18 U.S.C. Sect. 209(a).]

This prohibition does not apply to "special government employees." That exclusion includes enlisted military personnel and Reserve and National Guard officers on training duty or who have been involuntarily called to active duty or who are on voluntary active duty for fewer than 130 days. Because you are on voluntary active duty for more than 130 days, this prohibition arguably applies to you and to your employer.

It is clear that Congress did not have Reserve and National Guard officers in mind when it enacted 18 U.S.C. Sect. 209. Congress was trying to prevent a subtle form of bribery. Let us assume that Jones is a taxpayer and Smith is an IRS auditor. Jones

"supplements" Smith's federal salary, and Smith cuts Jones some slack during the audit. But no explicit *quid pro quo* is ever verbalized, making it difficult to prove bribery beyond a reasonable doubt. Such a payment, under these circumstances, would constitute a crime by both Jones and Smith—a fairly clear violation of 18 U.S.C. Sect. 209.

In the example you give, however, we cannot see how the harm Congress sought to prohibit (subtle bribery or external "control" of government employees) is accomplished by penalizing citizen-soldiers and their patriotic employers. Your former employer is making the voluntary payments to you strictly because the company believes it is the right thing to do—not as compensation for your service as a Reserve or Guard officer. It is extremely unlikely that any U.S. attorney would prosecute a Reserve or Guard officer or an employer under circumstances like those you have set forth. The Supreme Court has held that there is an implied but essential element to criminal liability under 18 U.S.C. Sect. 209—there must be proof of intent to influence the government employee by such payment. Without proof of such intent, there can be no criminal liability by the payer or the payee. [*See Crandon v. United States,* 494 U.S. 152 (1990).]

Under the facts as you have stated them, an argument can also be made that your civilian employer is making those voluntary payments as a continuation of your civilian job benefits and

as an inducement for you to return to their employ when your military service has been completed—not as "compensation for [your] services as an officer of the United States Government." Having said that, we favor a statutory amendment to the law, making it abundantly clear that it is not unlawful for an employer to voluntarily supplement the pay of any employee or former employee who has entered upon active duty, voluntarily or involuntarily, and that it is not unlawful for the employee or former employee to accept any such payment from the employer or former employer.

Susan Lukas, ROA's legislative director, has convinced several senators and representatives to introduce legislation along these lines. She is optimistic that such legislation will be enacted this year.

Military titles used for purposes of identification only. The views expressed herein are the personal views of the authors and not necessarily the views of the Department of the Air Force, the Department of the Navy, the Department of Defense, or the U.S. government.

Update – May 2022

In 2004, Congress added a new subsection to 18 U.S.C. 209.[3] The subsection states:

> "(h) This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10 from receiving from any person that employed such member before the call or order to active duty any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order to active duty."

[3]Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 663, 118 Stat. 1811.